

## PAST AS PROLOGUE: OLD AND NEW FEMINISMS

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As historians know, the process of peering into the past is not simply an act of discovery, but an active process of reconstruction. To try to understand where we are, we try to make sense of where we have been. What is most striking to me is that the past is never really over. Each “stage” of feminist legal theory—and each brand or strand of feminism—stays alive and is never completely replaced by newer approaches.

When I first attempted to synthesize the field of Feminist Legal Theory for a treatise I was writing at the end of the twentieth century, I thought it would be useful to think chronologically and to analyze the major developments of the 1970s, 1980s, and 1990s.<sup>1</sup> I started with the 1970s because that decade was the moment when second-wave feminism began to find its way into the law. To say that feminist legal theory began in the 1970s is, of course, inaccurate—the term Feminist Legal Theory (and its predecessor, Feminist Jurisprudence) did not emerge until nearly the 1980s,<sup>2</sup> when the field had developed sufficiently to give us the space to theorize about the relationship between gender and law. Nevertheless, when I looked at the shape of the field at that time, I crudely divided feminist legal theory into three stages roughly corresponding to the preceding decades: the equality stage of the 1970s, the difference stage of the 1980s, and the diversity stage of the 1990s. Liberal feminism dominated the 1970s with its emphasis on formal

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- 1. See MARTHA CHAMALLAS, INTRODUCTION TO FEMINIST LEGAL THEORY 15–22 (2d ed. 2003) (discussing three stages of feminist legal theory).
- 2. The phrase “feminist jurisprudence” was purportedly first used in 1978 at a conference celebrating the twenty-fifth anniversary of women graduates at Harvard Law School. See Patricia A. Cain, *Feminist Jurisprudence: Grounding the Theories*, 4 BERKELEY WOMEN’S L.J. 191, 193 (1989–90). Many writers now prefer the term “feminist legal theory” because it does not carry the quasi-scientific connotations of the term “jurisprudence.”

equality and the similarities between men and women.<sup>3</sup> In the difference stage of the 1980s, both dominance feminism (a.k.a. radical feminism) and cultural feminism (a.k.a. relational feminism) entered the legal discourse, as the critically important scholarship of Catharine MacKinnon and Carol Gilligan captivated feminist legal writing.<sup>4</sup> In their own distinctive ways, each of these theories offered a critique of the limitations of formal equality and liberal feminism by emphasizing differences between men and women. By the 1990s, the frame shifted from comparing men and women to noticing the very different social positions of specific subgroups of women and to thinking more deeply about diversity among women. Anti-essentialist or intersectional feminism emerged at this time, with its concentration on analyzing other important dimensions of identity, such as race, ethnicity, and sexual orientation and their interconnections with gender.<sup>5</sup>

It is much more difficult to describe feminist legal theory in this century. For this essay, I have borrowed from Rosalind Dixon's terrific 2008 article in which she canvasses the last four decades and divides legal feminism into "older" feminisms and "newer" feminisms.<sup>6</sup> The older feminisms—which I will call the "Big Three"—are liberal, dominance, and cultural feminism. The newer feminisms also come in threes: partial agency (or sex-positive) feminism, intersectional (or anti-essentialist) feminism, and postmodern/poststructural feminism.<sup>7</sup> I will call them the "New Three." The major difference between Dixon's taxonomy and my three stages of feminist legal theory is Dixon's astute positioning of the Big Three feminisms as foundational theories that have been taken up by mainstream scholars beyond feminist circles. Dixon also presents a more refined description of contemporary legal feminist thought, going beyond intersectional feminism to add two new strands of feminist theory, sex-positive feminism and postmodern feminism, that have come into their own in this century.<sup>8</sup>

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3. See CHAMALLAS, *supra* note 1, at 23–38.

4. See CATHARINE A. MACKINNON, *FEMINISM UNMODIFIED: DISCOURSES ON LIFE AND LAW* (1987); CAROL GILLIGAN, *IN A DIFFERENT VOICE: PSYCHOLOGICAL THEORY AND WOMEN'S DEVELOPMENT* (1982).

5. See Cain, *supra* note 2; Kimberlé Crenshaw, *Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics*, 1989 U. CHI. LEGAL F. 139; Angela P. Harris, *Race and Essentialism in Feminist Legal Theory*, 42 STAN. L. REV. 581 (1990).

6. Rosalind Dixon, *Feminist Disagreement (Comparatively) Recast*, 31 HARV. J. L. & GENDER 277 (2008).

7. See *id.* at 282–86.

8. See *id.* at 282–83 (sex positive feminism) (citing Kathryn Abrams, *Sex Wars Redux: Agency and Coercion in Feminist Legal Theory*, 95 COLUM. L. REV. 304 (1995); Katherine Franke, *Theorizing Yes: An Essay on Feminism, Law and Desire*, 101

I use Dixon's taxonomy as a map to locate the scholarly contributions of today's panelists and to theorize a bit about the present state of feminist legal theory. At the end of this essay, I will briefly glimpse into the future of feminist legal theory and mention two promising lines of emerging scholarship, masculinities theories and social justice feminism, that demonstrate the capacity of feminist legal theory to generate new insights for a new generation.

### I. THE BIG Three FEMINISMS: CONTINUING EFFECTS

To demonstrate that the past is never really over, let me put on a polyester pants suit and travel back to the 1970s. The story of the 1970s is still the most familiar. Liberal feminism came onto the scene with its demands for equal access and equal treatment of men and women. The central theme was providing legal and cultural support for the so-called "nontraditional" woman, particularly the woman breaking into male-dominated domains, in blue collar jobs, white collar professions, and elite universities. The line of cases in the United States Supreme Court that dismantled gender classifications in the law—those equal protection cases litigated by women's rights lawyers such as Ruth Bader Ginsburg<sup>9</sup>—were all about getting rid of "separate spheres" ideology and challenging traditional gender roles.<sup>10</sup> Although this was also the decade that produced *Roe v. Wade*,<sup>11</sup> there was a greater emphasis on bread-and-butter issues, what we would now call economic justice. Perhaps because I am old enough to have been around then, I tend to resist the facile idea that 1970s feminism was inherently assimilationist and did little to challenge male norms or male institutions. It did then and I think it still does.

In case you thought the 1970s were over, take a look at Lilly Ledbetter, the plaintiff in the infamous case decided by the Supreme Court in 2007.<sup>12</sup> Ledbetter's claim was a 1970s-style demand for "equal

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COLUM. L. REV. 181 (2001); *Id.* at 284–85 (postmodern feminism) (citing JUDITH BUTLER, *GENDER TROUBLE: FEMINISM AND THE SUBVERSION OF IDENTITY* (1990); Mary Jo Frug, *A Postmodern Feminist Legal Manifesto (An Unfinished Draft)*, 105 HARV. L. REV. 1045 (1992)); *see also* Cheryl Hanna, *Rethinking Consent in a "Big Love" Way*, 17 MICH. J. GENDER & L. (forthcoming 2010) (discussing the liberal shift of sex-positive theorists).

9. *See* Deborah L. Markowitz, *In Pursuit of Equality: One Woman's Work to Change the Law*, 11 WOMEN'S RTS. L. REP. 73 (1989).

10. *See* Linda K. Kerber, *Separate Spheres, Female Worlds, Woman's Place: The Rhetoric of Women's History*, 75 J. AM. HIST. 9 (1988).

11. *Roe v. Wade*, 410 U.S. 113 (1973).

12. *Ledbetter v. Goodyear Tire & Rubber Co.*, 550 U.S. 618 (2007).

pay for equal work.” Ledbetter worked as a supervisor for nineteen years at a Goodyear plant in Gadsden, Alabama. For most of the time, she was the only woman in her position. Although she started out making the same salary as the male supervisors, she received a series of lower-than-average raises from her male managers, whom she claimed discriminated against her because she was a woman. By the time she took early retirement, her pay was 15-40 percent lower than her male counterparts’, a disparity that would carry over into her retirement years.

Ledbetter succeeded in convincing an Alabama jury that she was a victim of intentional sex-based wage discrimination. However, the United States Supreme Court took her entire award away, ruling that her claim was time-barred and that she should have sued years before when she was first given a raise that was tainted by sex discrimination.<sup>13</sup> The highly formalistic 5-4 decision, authored by Justice Alito, was blind to the realities of the workplace and to the situation of working women. Ledbetter did not even know she was paid less than her male counterparts until just before she retired, when she received an anonymous note divulging the pay schedule at the plant.<sup>14</sup> Like most companies, Goodyear kept its salary schedule confidential and strongly discouraged employees from discussing their salaries. The Court’s ruling required Ledbetter to sue before she had concrete evidence of a pay disparity, and before that disparity had built up to one sizeable enough to be worth suing over. Through this decision, the High Court revealed that it was unwilling to enforce even a limited vision of equal pay for equal work in the twenty-first century. The Chamber of Commerce had won yet another victory.

I regard Justice Ginsburg’s dissent in *Ledbetter* as her finest hour. She challenged Congress to act and in doing so put pay equity back on the map again.<sup>15</sup> I testified on a panel with Ledbetter before a House committee considering legislation to override the decision<sup>16</sup>—legislation that later became known as the Lilly Ledbetter Fair Pay Act.<sup>17</sup> Ledbetter’s narrative of her experience at Goodyear was compelling. She described not just the injustice of getting paid less, despite performing as well as the men, but also how she had been sexually harassed by one of her

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13. *Ledbetter*, 550 U.S. at 637.

14. See Impact of *Ledbetter v. Goodyear* on the *Effective Enforcement of Civil Rights Laws: Hearing Before the Subcomm. on the Constitution, Civil Rights, and Civil Liberties, of the H. Comm. on the Judiciary*, 110th Cong. 9 (2007) [hereinafter *Hearing*] (prepared statement of Lilly Ledbetter).

15. See *Ledbetter*, 550 U.S. at 661 (Ginsburg, J., dissenting) (“Once again, the ball is in Congress’ court.”).

16. See *Hearing*, *supra* note 14.

17. Lilly Ledbetter Fair Pay Act of 2009, Pub. L. No. 111-12, 123 Stat. 5 (2009).

bosses, how she feared that she would be retaliated against for refusing his sexual advances, how difficult it was being a divorced woman raising kids on her salary, and how the other women at the plant also experienced sex discrimination, but were afraid to come forward because they did not want to risk putting their jobs in jeopardy by suing.<sup>18</sup> Although her claim for pay discrimination may have fit the formal equality/liberal feminist mold, her personal story was much more nuanced: it defied simple labeling and exposed familiar structural inequities in male-dominated workplaces.

Ledbetter ultimately was victorious, even though she will never see a penny of her jury award. The Lilly Ledbetter Fair Pay Act was the first piece of legislation signed by President Obama, with Ledbetter there at his side. The legislation itself is quite modest, simply fixing the cramped judicial interpretation of the statute of limitations in Title VII pay discrimination suits.<sup>19</sup> But the Ledbetter case, like liberal feminism, carries a more radical potential. It has given new life to additional legal reforms, such as the proposed Paycheck Fairness Act,<sup>20</sup> which would prohibit employers from relying on an employee's salary in a previous position, or on the employee's inability to negotiate for a higher salary, on other non-performance-based reasons, in order to justify pay disparities between men and women who work in the same job. That proposed legislation also contains a provision that would protect employees from retaliation when they discuss their salaries with other employees. The Ledbetter victory might also help with the passage of the long overdue Employee Free Choice Act<sup>21</sup> —the so-called “card check” legislation—that would begin to level the playing field for union organizers. My point is that there are some claims for equality that, once unleashed, cannot easily be contained. Liberal feminism may be the tamest of the Big Three, but it still has the capacity to produce results for women.

In reflecting on the impact of cultural and dominance feminism, let me start by saying that although the 1980s was a bad time for the nation, it was a very productive period for feminist legal theory. The doctrinally-oriented women's rights scholarship of the 1970s gave way to bolder statements by feminist scholars who envisioned how law might be transformed by feminist critiques and commitments. That period is

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18. See *Hearing*, *supra* note 14, at 8, 70.

19. See Charles A. Sullivan, *Raising the Dead?: The Lilly Ledbetter Fair Pay Act*, 84 *TULANE L. REV.* 499 (2010).

20. The House of Representatives passed the Paycheck Fairness Act in January 2009. See 155 *CONG. REC.* H138 (daily ed. Jan. 9, 2009); H.R. 12, 111th Cong. (2009). It is awaiting action in the Senate.

21. H.R. 1409, S. 560, 111th Cong. (2009).

also often thought of as a time when the divisions among feminists became more visible. And certainly the tone of cultural feminism differed from that of dominance feminism. Cultural feminists emphasized relationships, the value of intimacy, the importance of mothering and caretaking, and other feminine activities.<sup>22</sup> They called for a re-valuing of women's work and women's contributions to our culture and envisioned a better world in which the different voice of women would be heard and acknowledged.<sup>23</sup> In legal circles, this type of feminism went down easy and soon there were a boatload of articles and studies mapping gender differences in what seemed to be every conceivable aspect of human activity, what the late Mary Jo Frug called "crude Gilliganism."<sup>24</sup>

In contrast, dominance feminists had a much sharper edge. They talked about women's lack of power, sexual subordination, and most of all sexual violence and pornography, with much less focus on economic issues than their liberal predecessors.<sup>25</sup> Their work was more vigorously resisted and caricatured as man-hating and sex-hating,<sup>26</sup> even while new legal causes of action, such as sexual harassment, were quick to take hold.<sup>27</sup> Soon sexual harassment suits began to outnumber other types of sex discrimination suits.<sup>28</sup> Looking back, dominance feminism has proved to be remarkably generative, providing the inspiration for new laws on stalking and domestic violence and significant changes in laws related to rape, sexual assault, and sex trafficking.

It is difficult to overestimate the impact of these three older feminisms on legal feminists of all stripes. You might have heard the saying that "we are all Legal Realists now," conveying the idea that legal realism

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22. See CHAMALLAS, *supra* note 1, at 53–60; Dixon, *supra* note 6, at 281 (citing ROBIN WEST, *CARING FOR JUSTICE* (1997)).

23. See Leslie Bender, *From Gender Difference to Feminist Solidarity: Using Carol Gilligan and an Ethic of Care in Law*, 15 VT. L. REV. 1, 39–42 (1990).

24. Mary Jo Frug, *Progressive Feminist Legal Scholarship: Can We Claim "A Different Voice?"*, 15 HARV. WOMEN'S L.J. 37, 50 (1992).

25. See CHAMALLAS, *supra* note 1, at 44–53; Dixon, *supra* note 6, at 282; CATHARINE A. MACKINNON, *TOWARD A FEMINIST THEORY OF THE STATE* (1989) (citing ANDREA DWORKIN, *PORNOGRAPHY: MEN POSSESSING WOMEN* (1981)).

26. See e.g., RENE DENFELD, *THE NEW VICTORIANS: A YOUNG WOMEN'S CHALLENGE TO THE OLD FEMINIST ORDER* 27 (1995) ("Instead of promoting women's rights, today's feminists are promoting man hating, separatism, and a stringent sexual morality.").

27. The number of sexual harassment complaints doubled in the 1990s. See DEBORAH L. RHODES & JENNIFER A. DROBAC, *ABA COMMISSION ON WOMEN IN THE PROFESSION, SEX-BASED HARASSMENT: WORKPLACE POLICIES FOR THE LEGAL PROFESSION* 5 (2002).

28. For example, in 1997, the EEOC received 15,889 charges of sexual harassment compared to 8,839 charges of other forms of sex discrimination. See [http://www.eeoc.gov/eeoc/statistics/enforcement/sexual\\_harassment.cfm](http://www.eeoc.gov/eeoc/statistics/enforcement/sexual_harassment.cfm).

has so thoroughly permeated mainstream legal thought that it has become invisible.<sup>29</sup> I am tempted to say something along those same lines about the core ideas of the Big Three feminisms. Liberal feminism has become so “second nature” to courts and scholars that formal legal distinctions between men and women have now virtually disappeared.<sup>30</sup> Moreover, even scholars and activists who would chafe at being described as either cultural or dominance feminists, or who would go to some lengths to distance themselves from Gilligan or MacKinnon, have often built upon the foundation laid by these two scholars.

Perhaps the most striking evidence of the force of cultural feminism being felt today is the notable success that Joan Williams has had in her work involving discrimination against mothers in the workplace. Williams coined the term the “maternal wall”<sup>31</sup> to describe the obstacles faced by mothers in the contemporary workplace and the persistence of the work/family conflict. Although she strongly rejects the label of cultural feminist, her scholarship nevertheless trades on the legacy of cultural feminism, especially its recognition of the devaluation of women’s caretaking roles. Even in the “family values” era of the 1980s, it was clear to cultural feminists that mothering was unpaid and unacknowledged work and that any paid employment that looked like mothering—such as teaching, nursing, social work, and the helping professions—was similarly undervalued, stigmatized, and destined to remain “women’s work.”<sup>32</sup>

Most importantly, cultural feminists focused attention on the stunningly ungenerous family leave policies in the United States, acknowledging the fact that a vast majority of women became mothers at some point in their lives.<sup>33</sup> I think it is safe to say that the work/family conflict has been one of the most intractable problems facing women in the United States and it has only been exacerbated with time.

Enter Joan Williams, a feminist theorist and academic with an activist bent. She has made a career out of dissecting the work/family

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29. See ANN SCALES, *LEGAL FEMINISM: ACTIVISM, LAWYERING & LEGAL THEORY* 5 (2006) (noting that no one can recall who first uttered the phrase because it has been repeated so often).

30. See CHAMALLAS, *supra* note 1, at 24–28 (discussing elimination of sex-based classifications).

31. Joan C. Williams & Nancy Segal, *Beyond the Maternal Wall: Relief for Family Caregivers Who Are Discriminated Against On the Job*, 26 HARV. WOMEN’S L.J. 77 (2003).

32. See Christine Littleton, *Reconstructing Sexual Equality*, 75 CAL. L. REV. 1279, 1296–1301 (1987).

33. See Linda J. Krieger & Patricia N. Cooney, *The Miller-Wohl Controversy: Equal Treatment, Positive Action and the Meaning of Women’s Equality*, 13 GOLDEN GATE U. L. REV. 513 (1983).

conflict and translating theory into practice. Her primary focus has been on mothers, although the primary category she deploys is “caregivers.” She has documented how mothers have been stereotyped, penalized, and marginalized by employers who either assume working mothers are incompetent and lack commitment once they give birth to their first or second child, or believe that mothers *should* place family responsibilities first and respond by denying pregnant women and mothers leaves or promotions, or even firing them.<sup>34</sup> Williams’s work has generated a new genre of lawsuits—known as “family responsibility” claims<sup>35</sup>—brought by both female and male employees alike who allege that their employers have treated them unfairly because of their family responsibilities.

Since the mid-1990s, these types of suits have increased exponentially, by over 300 percent. Even more remarkable, they have had a success rate of over 50 percent, well above the dismal success rate of 20 percent for other kinds of employment discrimination claims.<sup>36</sup> Williams clearly touched a nerve, even though the law on the books is not particularly receptive to caregiver claims.<sup>37</sup> After Williams testified before the Equal Employment Opportunity Commission in 2007, the agency issued an Enforcement Guidance to employers detailing the ways in which discrimination against caregivers might violate the law, despite the lack of an express prohibition against caregiver discrimination under federal law.<sup>38</sup> The Guidance is not the kind of document you would have expected to come out of the Bush administration. It gives detailed examples of how employers discriminate against mothers with young children, stereotype mothers during the hiring process, give biased evaluations of a working mother’s job performance, discriminate against male caregivers, treat women of color who are caregivers less favorably than white women, and deny opportunities to employees who have primary responsibility for caring for disabled children, spouses, or parents. It is telling that one of the stated priorities of the Obama administration is to publicize and find effective ways to enforce these guidelines.

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34. See Williams & Segal, *supra* note 31.

35. See Joan C. Williams & Stephanie Bornstein, *The Evolution of “FReD”: Family Responsibilities Discrimination and Developments in the Law of Stereotyping and Implicit Bias*, 59 HASTINGS L.J. 1311 (2008).

36. Eyal Press, *Family-Leave Values*, N.Y. TIMES, July 29, 2007, § 6 (Magazine), at 36.

37. See U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, ENFORCEMENT GUIDANCE: UNLAWFUL DISPARATE TREATMENT OF WORKERS WITH CAREGIVING RESPONSIBILITIES (May 23, 2007) (noting that federal EEO laws do not prohibit discrimination against caregivers per se and that the caregiver guidance does not create a new protected category).

38. *Id.*



I see the imprint of cultural feminism all over the caregiver guidance and the family responsibility lawsuits, despite the liberal framework in which anti-discrimination laws currently operate. Such claims make sense only if one accepts that caring for family members is as valuable to society as paid employment and that women should not have to sacrifice their families for their work. It may be that we can hear the “different voice” a bit more clearly now that a generation has passed since Gilligan published her groundbreaking book.

For evidence of the continued strong impact of dominance feminism on law and contemporary scholarship, one need look no further than to the amazing scholarship of the professors on the Privacy and Cyberspace Panel. Their contributions prove that dominance feminism still has the power to illuminate in new contexts. Ann Bartow, for example, employs a dominance-feminist lens to explain the importance of pornography to the Internet, calling it the “dominant industrial force that has driven the evolution of the Internet” and observing that the “law of cyberspace is largely the law of pornography.”<sup>39</sup> Similarly, Debora Halbert’s commentary at this symposium draws heavily on dominance feminist theory in her critique of Web sites devoted to “upskirting” and other forms of sexual exploitation.<sup>40</sup> Finally, Jessica Litman’s contrast and comparison of women’s participation in 1970s “consciousness-raising” groups to women bloggers’ personal narratives carries MacKinnon’s insights on feminist methods into a new and critically important terrain where young women daily create and experience their identities.<sup>41</sup>

## II. THE NEW THREE FEMINISMS: COMPLEXITY MEETS LAW

Like most smart daughters, the New Three feminisms that have emerged in the past twenty years often take aim at the Big Three feminisms and can perhaps best be understood as a response to them. All of the newer feminisms are centrally interested in questions of personal identity and all stress the complexity of identity: they highlight that we

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39. Ann Bartow, *Open Access, Law, Knowledge, Copyrights, Dominance and Subordination*, 10 LEWIS & CLARK L. REV. 869, 881 (2006).

40. “Upskirting” refers to the practice of taking photographs, often on a cell phone camera, up an unsuspecting woman’s skirt. There are numerous Web sites on which “upskirters” exchange tips on how to get the best pictures. See Emine Saner, “*I felt completely violated*,” THE GUARDIAN, February 25, 2009, at 16.

41. See CATHARINE A. MACKINNON, TOWARD A FEMINIST THEORY OF THE STATE 83–105 (1989) (discussing consciousness raising groups and the process of consciousness raising).

are agents and victims simultaneously; that we are women and members of other social groups simultaneously; and that our identity is constantly shifting and unstable because it is not natural or fixed, but socially constructed.

Rosalind Dixon claims that another common feature of these newer feminisms is that they are consistently more skeptical of the capacity of law to act as a vehicle for achieving feminist change.<sup>42</sup> She may be right, although I still detect the lawyer's impulse to imagine and recommend legal reforms among some of these newer feminist scholars. For example, Cheryl Hanna's 1996 article on mandated victim participation in domestic violence prosecutions in the *Harvard Law Review*<sup>43</sup> demonstrates a pragmatic "newer" feminist approach that does not give up on legal reform. However, like the new crop of feminists, Hanna's scholarship is not utopian; she appreciates the imperfections of the criminal justice system, the real possibility of unintended consequences, and understands that social practices and legal reforms can both help and hurt different groups of women and individual women at the same time.

One "newer" brand of feminist theory that is particularly well represented in this conference is "partial agency" feminism or "sex-positive" feminism, the brand of feminist theory that challenges the premises of both dominance and cultural feminism. Scholars like Katherine Franke and Kathryn Abrams believe that while sex is a source of danger for women, it is also a potentially important site for pleasure, fulfillment, and even power.<sup>44</sup> Franke's scholarship (the sex-positive strand) has focused on what she calls "repronormative" ideologies that pressure women into becoming mothers and that valorize reproduction over other socially productive activities.<sup>45</sup> Franke, I take it, would not be a fan of the Equal Employment Opportunity Commission's new caregiver protections. She would undoubtedly fear that the new guidelines would serve to reinforce an ideology that women are or should be mothers, despite the gender-neutral framing of the law.

The partial-agency strand of this newer feminism stresses possibilities for the exercise of women's sexual agency, rather than focusing principally on our victimization. These partial-agency feminists regard as

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42. Dixon, *supra* note 6, at 300.

43. Cheryl Hanna, *No Right to Choose: Mandated Victim Participation in Domestic Violence Prosecutions*, 8 HARV. L. REV. 1849 (1996).

44. See e.g., Katherine M. Franke, *Theorizing Yes: An Essay on Feminism, Law, and Desire*, 101 COLUM. L. REV. 181 (2001); Kathryn Abrams, *Sex Wars Redux: Agency and Coercion in Feminist Legal Theory*, 95 COLUM. L. REV. 304 (1995).

45. See Franke, *supra* note 44, at 197.

a key source of gender injustice the prevailing ideologies that cast sex as dangerous and illegitimate, particularly for certain groups of women. A wonderful example of this approach is Deborah Denno's dissection of the stereotypes, moralisms, and pejorative labeling associated with mentally challenged women when they engage in sexual activity. Denno is very much concerned that "protection" of mentally challenged women through specially-focused criminal laws robs them of their ability to have consensual sex and deprives them of an important dimension of their lives. Although she recognizes that sexual activity for mentally challenged women carries a high risk of exploitation, she is bold enough to assert that "exposure to emotional cruelty is a risk that all individuals take when deciding to engage in any kind of sexually intimate relationship . . . ."<sup>46</sup> This desire to enlarge our conception of consensual sex seems a far cry from Catharine MacKinnon's expansion of the boundaries of sexual coercion.

I would also locate Michelle Anderson's "negotiation" approach to defining consent in cases of alleged acquaintance rape in this "partial agency" feminist camp,<sup>47</sup> although at times she seems more like a successor to, rather than a critic of, Catharine MacKinnon. Significantly, Anderson's negotiation model requires that persons who want to initiate sexual intercourse first engage their partners actively in a decision-making process before penetration occurs. I see this move as primarily intended to bolster women's sexual agency, even if it does not criminalize all forms of unwanted sex. Although negotiation models, such as Anderson's, are still too radical for most courts, legislatures, and the general public, it is important to recognize that they do not reach all forms of bad sex. Anderson believes, for example, that

[T]he law cannot do anything about those women who agree to unpleasant penetration from their husbands because they imagine it is their "wifely duty"; nor can the law help a 17 year old boy who agrees to sexual penetration that he does not desire because he hopes it will prove he is a man. The law cannot do anything about a young woman who agrees to dangerous, unprotected penetration in order to impress her friends. It cannot do anything for persons who, having suffered chronic sexual abuse as children, come to think of themselves as their

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46. Deborah W. Denno, *Sexuality, Rape, and Mental Retardation*, 1997 U. ILL. L. REV. 315, 375 (1997).

47. Michelle J. Anderson, *Negotiating Sex*, 78 S. CAL. L. REV. 1401 (2005).

perpetrators thought of them, and so seek to engage in degrading sexual acts.<sup>48</sup>

These telling examples of women's partial agency demonstrate the difficulty of trying to shape the law to prevent victimization, while at the same time recognizing women's agency. They also underscore why newer feminist theories might be less sanguine about legal reform.

The second of the New Three feminisms has less of a presence at this conference, although it is perhaps the best known. It goes by a few different names: intersectional feminism, critical race feminism, or anti-essentialist feminism.<sup>49</sup> The key insight of these theories is that gender hierarchies intersect and circulate with other social hierarchies such as race, class, age, sexual orientation, disability, and immigrant status. The "anti-essentialist" feature of these theories resists finding commonalities among all women, stressing that women are situated differently and experience distinctive kinds of discrimination.<sup>50</sup> It also recognizes that as women we are simultaneously privileged and subordinated along different dimensions. Anti-essentialist feminists are also more willing to acknowledge that women can and do oppress other women. Scholars such as Kimberlé Crenshaw<sup>51</sup> and Regina Austin<sup>52</sup> have stressed the importance of a "bottom up" feminism centering on the experience of women of color and working class women, whose stories tend to be eclipsed in mainstream feminism agendas.

Although this genre of feminist scholarship has been sharply critical of older feminisms, it has also held out the promise of diversifying the feminist movement and keeping feminism relevant. As you know, the feminist movement is often portrayed in the media as old-school, white, and marginal. And we are all aware of the reluctance of younger women to call themselves feminists. However, in a forthcoming article on social justice feminism,<sup>53</sup> Verna Williams and Kristen Kalsem from the University of Cincinnati look more closely at the numbers, discussing recent research from the Center for the Advancement of Women. A fact of importance is that women of color are more aligned with feminism these days than are white women. When asked whether being a feminist was "an important part of who they are," only 41 percent of white women

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48. *Id.* at 1423.

49. See CHAMALLAS, *supra* note 1, at 78–92; Dixon, *supra* note 6, at 283–84.

50. CHAMALLAS, *supra* note 1, at 81.

51. Crenshaw, *supra* note 5.

52. Regina Austin, *Sapphire Bound!*, 1989 WIS. L. REV. 539 (1989).

53. Kristin Kalsem & Verna L. Williams, *Social Justice Feminism 1* (Univ. of Cincinnati Coll. of Law Pub. Law & Legal Theory Research Paper Series No. 08-14, 2008), available at <http://ssrn.com/abstract=1112105>.

said yes, compared to 63 percent of black women and 68 percent of Latina women. Similarly, black women and Latinas were far more likely than white women to voice support for a stronger women's movement. These numbers are not surprising when we consider that a majority of white women voted against Barack Obama,<sup>54</sup> a statistic I must confess that I still cannot wrap my mind around.

In addition to reaching out to a more inclusive group of women in the United States, intersectional feminism and critical race feminism have gone global. Feminist writers such as Leti Volpp,<sup>55</sup> Adrien Wing,<sup>56</sup> and Madhavi Sunder<sup>57</sup> have critiqued the form of essentialism that tends to set Western feminism as the standard for judging the condition of women throughout the world. By focusing on the situation of women in other countries and on immigrant women, this genre of feminist scholarship has been particularly effective in tracing the social and political origins of what are commonly thought to be "religious" differences and has begun to interrogate the critical role that religion plays in the lives of women worldwide. Judging from the titles of feminist articles in United States law reviews over the last decade, it is safe to say that feminist scholarship has stayed relevant in no small part because it has taken a comparative and international turn.

Last but not least of the New Three feminisms is postmodern or poststructuralist feminism. Although there has definitely been a postmodern turn in feminist legal scholarship, feminist legal theory is not yet as thoroughly postmodern as many other disciplines. Postmodern scholars tend to target sex-based categories that they see as a key source of gender injustice. In particular, they attack gender polarity and "resist the binary." They challenge the still-dominant conception that the sexes are opposite and that there are only two sexes, *i.e.*, men and women.<sup>58</sup> For many of these scholars, a key concept is "gender performance" or "identity performance," a postmodern term that focuses attention on how a person presents herself through, among other things, dress, language, personal style, and everyday behaviors. The path-breaking

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54. Obama won 46 percent of votes from white women, compared to 68 percent from Latinas and 96 percent from black women. See Center for American Women and Politics, *Gender Gap Evident in the 2008 Election, Women, Unlike Men, Show Clear Preference for Obama over McCain* (Nov. 5, 2008), available at [http://www.cawp.rutgers.edu/press\\_room/news/documents/PressRelease\\_11-05-08\\_womensvote.pdf](http://www.cawp.rutgers.edu/press_room/news/documents/PressRelease_11-05-08_womensvote.pdf).

55. Leti Volpp, *Feminism Versus Multiculturalism*, 101 COLUM. L. REV. 1181 (2001).

56. Adrien Katherine Wing & Monica Nigh Smith, *Critical Race Feminism Lifts the Veil? Muslim Women, France, and the Headscarf Ban*, 39 U.C. DAVIS L. REV. 743 (2006).

57. Madhavi Sunder, *Piercing the Veil*, 112 YALE L.J. 1399 (2003).

58. See Anne Bloom, *To Be Real: Sexual Identity Politics in Tort Litigation*, 88 N.C. L. REV. 357 (2010) (critiquing presumption of gender polarity in tort law).

scholarship of Devon Carbado and Mitu Gulati,<sup>59</sup> along with Kenji Yoshino,<sup>60</sup> for example, details how outsiders are constantly forced to make strategic choices about how to present themselves, against a backdrop of stereotypes and implicit assumptions about people “like them,” and recounts how they are often required to cover or downplay their identities to meet the demands for assimilation that employers and other institutions place on them.

The objective for many postmodern scholars is to ameliorate the oppression of individuals who do not or will not conform. Of the New Three feminisms, postmodern feminism is the most difficult to translate into positive legal change. Indeed, many postmodernists have a decidedly deregulatory impulse, often presuming that the law is the problem and that it serves mainly to reinforce dominant ideologies.

Even postmodern feminists, however, must also make strategic choices. An example from anti-discrimination law well illustrates how postmodern theory can play out in a concrete legal context. As the speakers from the Trans Panel described, for quite some time, gay and lesbian rights advocacy groups have pushed to amend Title VII to add “sexual orientation” to the current list of prohibited classifications under federal employment discrimination law, consisting currently of race, color, sex, religion, and national origin. The proposed legislation, known as ENDA (the Employment Non-Discrimination Act),<sup>61</sup> however, has never secured enough votes for passage. It passed in the House, but has not yet made it through the Senate.

Nevertheless, in the last decade, gay, lesbian and transsexual plaintiffs have had some success winning Title VII harassment cases. They have convinced courts that their mistreatment amounts to a form of impermissible “gender stereotyping,” relying on the 1989 case of *Price Waterhouse v. Hopkins*,<sup>62</sup> which held that a female accountant could not be denied a partnership because she was too macho and not sufficiently lady-like. Eventually, some courts began ruling that *Price Waterhouse’s* “anti-stereotyping” theory applied to male plaintiffs who were penalized for being too effeminate<sup>63</sup> and then to openly gay plaintiffs who were harassed because of their gender non-conformity.<sup>64</sup> One prominent Sixth Circuit case held that a transsexual firefighter could challenge discrimi-

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59. Devon W. Carbado & Mitu Gulati, *The Fifth Black Woman*, 11 J. CONTEMP. LEGAL ISSUES 701 (2001); Devon W. Carbado & Mitu Gulati, *Working Identity*, 85 CORNELL L. REV. 1259 (2000).

60. Kenji Yoshino, *Covering*, 111 YALE L.J. 769 (2002).

61. H.R. 3017, 111th Cong. (2009).

62. *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989).

63. *Nichols v. Azteca Rest. Enters., Inc.*, 256 F.3d 864, 874 (9th Cir. 2001).

64. *Rene v. MGM Grand Hotel Inc.*, 305 F.3d 1061, 1069 (9th Cir. 2002) (*en banc*).

nation against him by co-workers who objected to his expressing a more feminine appearance at the time he was transitioning from male to female.<sup>65</sup> This progressive strand in Title VII doctrine is not uniform, however. Other courts have refused to protect such plaintiffs, ruling that Congress never intended to afford relief in anti-gay or anti-trans cases.<sup>66</sup>

In 2007, the Democratic House struggled with ENDA. One version of the proposed legislation provided dual protection against not only discrimination based on sexual orientation, but on the basis of gender identity as well. When some Congressional members balked at including "gender identity" in the bill, Representative Barney Frank relented and pushed through a bill that listed only sexual orientation,<sup>67</sup> causing much anger in the LGBT community.

As Trans Panel members Julie Greenberg, Marybeth Herald, and Mark Strasser explained, however, if Congress merely adds "sexual orientation" to Title VII, it will create another loophole in the law, leaving out protection for trans and intersex plaintiffs. This gap is particularly likely to occur if courts interpret ENDA as a signal that they should stop expanding protection under the "gender stereotyping" theory of *Price Waterhouse*.<sup>68</sup> The important strategic question then becomes whether efforts to add additional protected classes to Title VII should be abandoned in favor of broader protection for specified conduct, such as a provision that would outlaw discrimination based on an employee's actual or perceived gender non-conforming behavior.

Such a shift from status to conduct may seem the ideal practical solution, except for the uncomfortable fact that all the current versions of ENDA also contain an exception for employer-mandated "reasonable grooming codes," which would likely severely restrict the kind of non-conforming gender performances that would be protected under such a law.<sup>69</sup> A recent decision from the "liberal" Ninth Circuit upholding an employer's requirement that its female employees wear makeup is

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65. *Smith v. City of Salem*, 378 F.3d 566 (6th Cir. 2004); *see also* *Schroer v. Billington*, 577 F. Supp. 2d 293 (D.D.C. 2008).

66. *Etsitty v. Utah Transit Auth.*, 502 F.3d 1215 (10th Cir. 2007); *Vickers v. Fairfield Med. Ctr.*, 453 F.3d 757 (6th Cir. 2006).

67. H.R. 3685, 110th Cong. (2007).

68. Julie A. Greenberg, *Intersex and Intrasex Debates: Building Alliances to Challenge Sex Discrimination*, 12 CARDOZO J.L. & GENDER 99 (2005); Marybeth Herald, *Transgender Theory: Reprogramming Our Automated Selves*, 28 T. JEFFERSON L. REV. 167 (2005).

69. The reasonable grooming code exception likely would continue to protect gender-based employer dress codes that track conventional norms. *See* Devon Carbado et al., *The Story of Jesperson v. Harrah's: Makeup and Women at Work*, in *EMPLOYMENT DISCRIMINATION LAW STORIES* 118 (Joel Friedman ed., 2006) (discussing "unequal burden" test for deciding whether a grooming code is reasonable).

testament to the resilience of binary ways of thinking about gender, especially in matters of personal appearance.<sup>70</sup> For that reason, postmodern feminist scholar Gomri Ramachandran has looked beyond anti-discrimination laws and argued for a unique right to “freedom of dress” that she believes will protect an individual’s agency in the construction of her own identity.<sup>71</sup>

The battles over ENDA expose the limitations of using identity-based and status-based legislation to combat modern forms of employment discrimination. They also demonstrate that it is exceedingly difficult to incorporate a postmodern resistance to categories into a statutory scheme premised on predetermined categories and protected classes. In a recent essay, Angela Harris has called for more dialogue between trans and feminist thinkers and has expressed the view that feminism can be enriched by once more re-examining crucial topics, such as our understandings of personal identity, that have gained new layers of complexity through the writings of trans theorists and activists.<sup>72</sup> Particularly given the ongoing struggle to expand civil rights law to encompass sexual minorities, this area seems ripe for new feminist legal interventions.

### III. THE FUTURE OF FEMINIST LEGAL THEORY: TWO SAFE PREDICTIONS

My crystal ball is so clouded that I will not here attempt to fathom a guess about the big questions facing feminist legal theory, like whether it will remain a distinctive field, or merge with other critical discourses such as critical race theory and queer theory, or whether the divisions among left scholars and activists will continue to deepen, so that Janet Halley will not only Take a Break From Feminism,<sup>73</sup> but will become more openly anti-feminist.

I can, however, make two safe predictions based on what I see as two new promising lines of scholarship. The first prediction is that postmodern feminist theory will continue to grow and give rise to interesting variations on a theme. There is now a group of legal scholars—

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70. See *Jespersen v. Harrah's Operating Co.*, 444 F.3d 1104 (9th Cir. 2006) (*en banc*).

71. Gomri Ramachandran, *Freedom of Dress: State and Private Regulation of Clothing, Hairstyle, Jewelry, Makeup, Tattoos, and Piercing*, 66 MD. L. REV. 11 (2006).

72. See Angela P. Harris, *Transgender Rights, and Whipping Girl: A Transsexual Woman on Sexism and the Scapegoating of Femininity*, 36 WOMEN'S STUD. Q. 315 (2008) (book review).

73. JANET HALLEY, *SPLIT DECISIONS: HOW AND WHY TO TAKE A BREAK FROM FEMINISM* (2006).



prominently including Frank Cooper, Nancy Dowd, and Ann McGinley<sup>74</sup>—who have been applying masculinities theories to the law.

Masculinities studies is an interdisciplinary field that draws upon feminist theory, sociology, and queer theory and investigates the different ways masculinity is socially constructed in particular contexts, *i.e.*, how men perform their masculinity. The operative term, “masculinities,” is deliberately plural to signify that different groups of men perform their masculinity differently. Frank Cooper, for example, has written a piece about Barack Obama called *Our First Unisex President: Black Masculinity and Obama’s Feminine Side*.<sup>75</sup> In it he explores how, as a black man, Obama must confront the cultural stereotype of the angry black man and has, over a lifetime, developed an ultra-calm demeanor to defuse that image. Cooper observed that during the campaign Obama sometimes displayed a cooperative, conciliatory and empathetic side—his feminine side—more so than other presidential candidates. You may recall that some even called him “prissy.” Cooper speculates that as a heterosexual black man Obama has had more room to feminize his gender performance without seeming too feminine. Of course, during the campaign, Hillary Clinton also had to worry about gender performance: she had to take care not to appear too feminine in order to pass the “Commander-in-Chief test” and, much like Ann Hopkins in *Price Waterhouse v. Hopkins*, was also required to cry at least once in public to prove that she was not too macho.

Feminist scholars have long been aware of the “double bind” facing women who must struggle to find just the right mix of authority and vulnerability to succeed in an unwelcoming environment. The fresh take of the masculinities scholars is how they dissect and uncover what is behind men’s gender performances and in the process demystify masculinity, bend gender, and deepen our understanding of relationships among men which ultimately affect us all.

The second prediction I will make is that intersectional feminist theory and its offshoots will have increasing importance in public policy. I previously mentioned Verna Williams and Kristen Kalsem’s new article on social justice feminism.<sup>76</sup> They use the label “social justice feminism” to describe a kind of feminism that is closely linked to other movements

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74. See Frank Rudy Cooper, “Who’s the Man?”: *Masculinities and Police Stops*, 18 COLUMBIA J. GENDER & L. 671 (2009); Nancy E. Dowd, *Maculinites and Feminist Legal Theory*, 23 WIS. J. L. GENDER & SOC’Y 201 (2008); Ann C. McGinley, *Masculinities at Work*, 83 OR. L. REV. 359 (2004).

75. Frank Rudy Cooper, *Our First Unisex President?: Black Masculinity and Obama’s Feminine Side*, 86 DEN. U. L. REV. 633 (2009).

76. Kalsem & Williams, *supra* note 53.

for social justice—in the U.S. and globally—with a clear focus on interlocking oppressions and systems of inequality. Their description of the features of social justice feminism does not really set it apart from intersectional feminism in any significant way, and one might be tempted to say that it is just another name for intersectional or anti-essentialist feminism. But the social justice feminism they envision is less academic and more applied, concentrating on concrete policy initiatives and social activism.

Under the banner of social justice feminism, I believe that we will see a push for more of what my colleague John Powell calls “Targeted Universal” programs,<sup>77</sup> a phrase that might at first sound like an oxymoron. As he uses the term, “Targeted Universalism” is an approach that supports the needs of the particular, while reminding us that we are all part of the same social fabric. While framed in universal terms, it captures how people are differently situated, and targets those who are the most marginalized. A modest, yet important, example of a targeted universal initiative is proposed legislation that would expand the Family Medical Leave Act to require at least seven days of *paid* sick leave for employees who are recovering from an illness or who need to stay home to care for a sick family member.<sup>78</sup> The legislation is universal because it is not gender- or race-specific, nor is it limited to mothers. But at the same time it is specifically targeted at lower income workers who most often work for employers who offer no sick leave, and it helps caregivers who cannot afford to take unpaid leave, a group composed mostly of women and largely of women of color.

In the coming years, I am going to be looking closely at Michelle Obama to see whether she publicly embraces social justice feminism in a way that resonates with women and the American public. A promising sign is her appointment of Jocelyn Frye from the National Partnership for Women and Families (formerly the Women’s Legal Defense Fund) to be her policy director.<sup>79</sup> I can predict that if there are feminist successes on the policy front, feminist legal writers will track these changes and theorize about them, something we have been waiting to do for quite some time. As it has in the past, practice will drive theory and will keep feminist legal theory alive. ♣

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77. John A. Powell, *Post-Racialism or Targeted Universalism?*, 86 DEN. U. L. REV. 785 (2009).

78. Healthy Families Act, H.R. 2460, S. 1152, 111th Cong. (2009).

79. Rachel L. Swarns, *Friendship Born at Harvard Goes on to White House*, N.Y. TIMES, Mar. 10, 2009, at A17.